



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: DECEMBER 13, 2022

IN THE MATTER OF:

Appeal Board No. 605753

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determinations (including November 25, 2014, August 16, 2017, and August 18, 2018) holding AHAVA MEDICAL & REHABILITATION CENTER, LLC (hereafter referred to as "the employer" or "AMRC") liable for additional contributions due for the audit period 2011 to 2013 in the revised amount of \$18,846.13 based on payments made to numerous individuals (e.g., doctors, therapists, nurses, medical assistants, and support staff) deemed as remuneration. Contending that individuals included in the audit performed services as independent contractors, the employer requested a hearing.

The Administrative Law Judge held hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employer and the Commissioner of Labor. By decision filed February 28, 2019 (), the Judge modified the initial determination to include A.Greenfield (AG) and Rabbani Mohammed (RM) (spelling per audit report), only, while excluding all other individuals or categories.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board, insofar as the decision modified the initial determination to exclude all individuals (except AG and RM). The Board considered the arguments contained in the written statement submitted on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: AMRC operates diagnostic and treatment centers at two

Brooklyn, New York locations where it provides medical and therapeutic services to the underserved populations. AMRC is a "volume practice that services a very large Medicare/Medicaid" population throughout the metropolitan area, including numerous children and adults of residential facilities (group homes) who need various medical and therapy services; and AMRC makes transportation arrangements for these residents to a AMRC facility. At its facilities, AMRC employs doctors, therapists, nurses, medical assistants, and various support staff, who are all conceded W-2 employees. Also, AMRC rents space in group home facilities throughout the greater metropolitan area to provide services to those residents at the group homes, at which AMRC deemed the doctors and various therapists (referred to as "medical professionals") to be independent contractors.

In September 2011, the Department of Labor conducted a random audit of AMRC for the period effective 2011 to 2013. At AMRC's center, the auditor met with AG who, identified himself as the CFO, showed the auditor to an office, made available the books and records, and answered various questions. Upon completing the audit, the Department included in the audit IRS 1099 and other payments relative to numerous individuals as covered employees. AG requested a hearing on AMRC's letterhead as AMRC's CFO.

Regarding AG and his wife (MG) (referred to individually as "bookkeeper" or collectively as "bookkeepers"), the initial determination included them as employees solely because the "payments were made to CEO Abraham Greenfield and his spouse whom (sic) performed bookkeeping services" on AMRC's behalf. The bookkeepers are experienced and owned an independent outside bookkeeping business they operated from their home office. They provided general bookkeeping services to multiple clients, including AMRC. They provided their services from their private office, as well as at AMRC's office where they frequently visited to obtain and review requisite documents needed to perform their bookkeeping duties that included financial data entry, accounts payable, and oversight of collections from insurance carriers. The bookkeepers had remote access to AMRC's QuickBooks accounting software to enter financial data from anywhere. They prepared AMRC's books that are transmitted to outside accountants who prepare AMRC's tax returns and financial statements. Upon the accountants and auditors quarterly review of the prepared books, the accountants remedied any error or directed the bookkeepers do so. AMRC imposed no amount of time to devote to their bookkeeping services, only to have the books maintained accurately and timely. With no written contract, AMRC paid each bookkeeper in installments of their agreed upon flat annual fee, which

was subject to reasonable increases for any additional services requested from time to time, and which required no submission of bills or invoices as a condition of payment. The bookkeepers provided all their own supplies, including accounting paper, stationary and the like, without reimbursement for such routine expenses. Occasionally, when AMRC requested the bookkeepers to meet with the accountants, AMRC reimbursed them for such things as parking fees and tolls. In the relevant audit period, AMRC respectively paid AG and MG \$31,200 each in 2011, \$33,600 and \$31,200 in 2012, and \$48,600 and \$43,200 in 2013. AMRC issued IRS 1099 forms in their personal capacities.

AMRC had a marketing initiative for its W-2 employees to refer its services to new clients. This sales function was above and beyond their normal employee job duties. For example, an employee may have called and visited a group home, ascertained its medical and therapeutic needs, and described the very broad range of multispecialty practice services provided by AMRC, and presented the advantages of a "single phone call to AMRC [to] take care of ... all the needs of the residents ... in one location". Related to the marketing initiative, an employee was provided no materials, training, leads, education, direction, or reimbursement. When any referral resulted in procuring a new client, AMRC paid the employee a straight commission based on a percent of the collected proceeds as a finder fee. AMRC issued IRS 1099 forms for this additional compensation.

The medical professionals working at the group homes where they provided their availability to AMRC, which scheduled them at the group homes. The medical professionals had their own practices and their own medical malpractice coverage, brought their own medical hand instruments and supplies, could decline servicing a patient, wrote up their notes, and submitted requisite information for billing purposes. AMRC supplied the office, the furnishings, and equipment; it recruited the medical professionals to be available at the group homes; it screened their credentials; it set their hourly rate and fees charged to clients; it required them to submit notes; it retained ownership of patient records; it fielded complaints; it processed insurance and patient billing under their credentials via a third-party; it paid them a portion of the generated fee prior to collection; and it handled the collections. The services provided to patients by these medical professionals were like that provided by acknowledged employees at AMRC's centers.

C.Medwynter, who is not listed as an acknowledged employee in the audit report, was issued an IRS 1099 in 2012 for \$95, which amount represents a

reimbursement.

AMRC concedes that M.Murray, who provided cleaning services, is an employee. AMRC also concedes that the 14 named individuals (medical assistants identified in the May 6, 2016 letter, Exhibit 5) were improperly classified as independent contractors (these individuals are not acknowledged employees listed on the audit report, except for K.Reed).

OPINION: An employment relationship may "rest upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results (citations omitted), [and that] control over the means is the more important factor to be considered." *Matter of Ted is Back Corp.*, 64 NY2d 725 (1984). However, "substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion of ultimate fact may be extracted reasonably - probatively and logically". *Matter of Yoga Vida NYC Inc.*, 28 NY3d 1013 (2016), rev'g 119 AD3d 1314 (3d Dept 2014), citing *300 Gramatan Ave. Assoc. v State of Div. of Human Rights*, 45 NY2d 17 (1978).

Regarding bookkeeping services provided by MG, the record establishes minimal indicia that AMRC exercised supervision, direction or control. MG had remote access to AMRC's financial software, and any needed corrections were directed by the third-party accountant. The occasional reimbursement was made due to AMRC's request to incur such expense, which reimbursement is not inconsistent with an independent contractor relationship. The annual fee, with no minimum or set work schedule, created a risk-of-loss if MG was unable to efficiently perform her services. Although office space was provided, this does not transform MG's status into an onsite worker - this office space is not only consistent with having to obtain and review the abundant financial documents, but it merely amounts to a "wise business decision". *Matter of Samuel Green Engraving Corp.*, 95 AD2d 904 (3d Dept 1983). See *Matter of Spinnell*, 300 AD2d 770 (3d Dept 2002). Cf. *Matter of Stewart (American Institute for Stuttering)*, 137 AD3d 1395 (3d Dept 2016).

We are unpersuaded by Commissioner of Labor's contention that MG is AMRC's employee based on AG engaging MG as a "helper, assistant, or employee of an employer" under Labor Law § 560(2). Initially, we note that although the Judge

included AG as an employee, AG's status was not appealed and therefore not

before the Board. Here, however, AG did not engage the services of MG. Rather, the record establishes that AMRC engaged both AG and MG and paid them separately. Accordingly, we hold that Labor Law § 560(2) is inapplicable.

Also, the record establishes additional indicia of an employer-employee relationship solely for AG (e.g., representing himself as the CFO) that are not pertinent to MG. Under the totality of the circumstances, MG was not an employee of AMRC with respect to the bookkeeping services during the relevant period for purposes of unemployment insurance.

Regarding AMRC's marketing initiative for its employees to find new clients, the record establishes no indicia that AMRC exercised supervision, direction or control in connection with the straight commissions paid to W-2 employees as a finder's fee (see, e.g., Appeal Board No. 579572; and Appeal Board No. 296303). AMRC provided no materials, training, leads, education, direction, or reimbursement in connection with such marketing. Significantly, the Commissioner does not argue that any earned commission is related to an employee's job duty or performance. Under limited circumstances, as here, an individual may wear two hats, one performing services as an employee and another one performing services as an independent contractor. Accordingly, the commissions paid to existing employees related to this marketing initiative should be excluded from covered employment for purposes of unemployment insurance.

We hold differently for the medical professionals. The evidence establishes that AMRC exercised, or reserved the right to exercise, sufficient supervision, direction or control over their services to hold employment relationships under the unemployment insurance law. Here, the medical services provided to the group home residents were not unlike those provided by acknowledged W-2 medical professionals serving patients at AMRC's centers. Also, AMRC recruited and screened them; it set their hourly rate and the fees charged to clients, required them to submit notes, retained ownership of patient records, fielded complaints, processed billing, handled collections (albeit through a third-party vendor), and paid a portion of the generated fee prior to collection. Although AMRC categorized these medical professionals at group homes to be working offsite versus medical professionals working at AMRC's centers to be onsite, such distinction is unpersuasive since AMRC supplied the furnished office space at the group homes. And even if AMRC did not directly supervise their daily activities, the Court has held that an organization, which screens the services of professionals, pays them at a set

rate, and offers their services to clients, exercises sufficient control to create an employment relationship. See *Matter of DeRoberts Plastic Surgery*, 198 AD3d 1033 (3d Dept 2021); *Matter of Millennium Medical Care, P.C.*, 175 AD3d 755 (3d Dept 2019); *Matter of Dillon (Human Care LLC)*, 163 AD3d 1307 (3d Dept 2018); and *Matter of Williams (Summit Health Inc.)* 146 AD3d 1210 (3d Dept 2017). Moreover, we note that the Judge improperly relied on *Matter of Giordano*, 161 AD 3d 1398 (3d Dept 2018), which is applicable to supplemental educational services (SES) that are provided and regulated by the Department of Education's approved provider (purported ER) that made available to its "clients - state and local government entities consisting primarily of counties and school districts - occupational therapy, physical therapy, speech therapy, special education and related services." Accordingly, the medical professionals providing services for AMRC should be included in the audit as covered employees for purposes of unemployment insurance.

As AMRC concedes to find employees for numerous individuals, including M.Murray, who provided leaning services, and the 14 individuals (medical assistants identified in the May 6, 2016 letter, Exhibit 5), their payments should be included in the audit as covered remuneration.

Finally, regarding C.Medwynter, who was not listed as an acknowledged employee, the record establishes no indicia that AMRC exercised supervision, direction or control in connection with the unrefuted \$95 reimbursement. The mere issuance of an IRS 1099 is not determinative to hold that such individual was paid hidden remuneration. Significantly, since AMRC has conceded to numerous other individuals who were misclassified as independent contractors, its claim in this regard is credible. Accordingly, the \$95 payment attributable to C.Medwynter should be excluded from the audit.

DECISION: The decision of the Administrative Law Judge, insofar as appealed, is affirmed in part and reversed in part.

The initial determinations, holding TION CENTER, LLC (hereafter referred to as "the employer" or "AMRC") liable for additional contributions due for the audit period 2011 to 2013 in the revised amount of \$18,846.13 based on payments made to numerous individuals (e.g., doctors, therapists, nurses, medical assistants, and support staff) deemed as employee remuneration, is further modified to include medical professionals, M.Murray, and the 14 individuals (medical assistants identified in the May 6, 2016 letter, Exhibit 5), and further modified to exclude MG, C.Medwynter, and the

marketing commissions.

The employer is liable, in part, with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER